IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE INC., Plaintiff, v. MASIMO CORPORATION and SOUND UNITED, LLC, Defendants.	C.A. No. 22-1377-MN-JLH **JURY TRIAL DEMANDED**
MASIMO CORPORATION, Counter-Claimant, v. APPLE INC., Counter-Defendant.	
APPLE INC., Plaintiff, v. MASIMO CORPORATION and SOUND UNITED, LLC, Defendants.	C.A. No. 22-1378-MN-JLH **JURY TRIAL DEMANDED**
MASIMO CORPORATION and CERCACOR LABORATORIES, INC., Counter-Claimants, v. APPLE INC., Counter-Defendant.	

PLAINTIFF AND COUNTERCLAIM-DEFENDANT APPLE INC.'S
UNOPPOSED MOTION TO REISSUE THE REPORT AND RECOMMENDATION

Plaintiff and Counterclaim-Defendant Apple Inc. respectfully moves the Court to reissue its June 20, 2023 Report and Recommendation, D.I. 124 (the "R&R"). Apple has conferred with counsel for Masimo and Masimo does not oppose reissuance of the R&R.

On June 20, 2023, this Court issued its R&R, which in part recommended denial of Apple's then-pending motions to dismiss and to strike. Under Fed. Rule Civ. P. 72(b)(2), Apple had fourteen days to file any objections. On June 23, 2023, after Masimo filed amended counterclaims and added an additional inequitable conduct defense, Judge Noreika denied the motions that were the subject of the R&R as moot, D.I. 133. Rather than burden this Court with another round of duplicative briefing, Apple instead requests that the R&R reissue as applying to those amended counterclaims and defenses so that Apple may promptly file two narrow objections.

First, with respect to Masimo's claims of inequitable conduct, Apple intends to object solely to the R&R's recommendation as it pertains to the alleged conduct of Apple's Chief IP counsel. ***Second***, with respect to Masimo's antitrust and unfair competition claims, Apple intends to object solely to obtain a more definitive holding that Masimo's "predatory infringement" and "monopoly leveraging" theories of liability are "invalid" as a matter of law, and that the case should not proceed on those theories. In the R&R, this Court "question[ed] … "the viability" of both theories. Tr. 19:16-20:2. Masimo has informed Apple that it nevertheless intends to continue to pursue both theories. Thus, Apple respectfully intends to seek a disposition in line with cases that have foreclosed similarly non-viable antitrust theories.[1]

[1] *See, e.g.*, *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 61 (D.D.C. 2022) (foreclosing further litigation of "invalid" and "legally infirm" antitrust theories, reasoning that "judicial economy" and "fidelity to the Federal Rules of Civil Procedure" preclude allowing "a discovery windfall" on issues that have "no conceivable bearing on the case"); *Thomas Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.*, 2022 WL 1224903 (D. Del. Apr. 2022); *see also New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 48 (D.D.C. 2021), *aff'd* 66 F.4th 288 (D.C. Cir. 2023) (holding that lawful refusals to deal are not actionable even if combined with other conduct).

Respectfully submitted,

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